

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

WILLIE MCINTOSH)	
Claimant)	
VS.)	
)	Docket No. 245,635
SEDGWICK COUNTY)	
Self-Insured Respondent)	

ORDER

By its decision filed June 11, 2004, the Kansas Court of Appeals remanded this claim to the Board with instructions to reduce claimant's workers compensation benefits by an appropriate amount due to his receipt of Social Security retirement benefits. The Board placed this claim on its summary docket for disposition without additional oral argument.

APPEARANCES

Steven R. Wilson of Wichita, Kansas, appeared for claimant. Richard J. Liby of Wichita, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award entered in this claim on January 31, 2003.

ISSUES

This is a claim for a June 25, 1999 accident. In the January 31, 2003 Award, the Judge determined claimant was realistically unemployable and, therefore, awarded claimant benefits for a permanent total disability. The Judge denied respondent's request that claimant's weekly benefit be reduced by the weekly equivalent of his Social Security retirement benefit. The Board affirmed the January 31, 2003 Award in its Order dated July 31, 2003.

Respondent appealed the Board's July 31, 2003 Order to the Kansas Court of Appeals, which entered its decision on June 11, 2004. The Kansas Court of Appeals remanded this claim to the Board for further proceedings consistent with its decision that claimant's workers compensation benefits should be reduced under K.S.A. 1998 Supp. 44-501(h) due to claimant's receipt of Social Security retirement benefits.

The only issue before the Board at this time is the appropriate reduction of claimant's workers compensation benefits under K.S.A. 1998 Supp. 44-501(h).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Board finds and concludes:

The Board determined in its July 31, 2003 Order that claimant was rendered permanently and totally disabled due to the June 25, 1999 accident that he sustained while working for respondent.

As noted in the initial Award entered by Judge Jon L. Frobish dated January 31, 2003, the parties stipulated claimant's average weekly wage on the date of accident was \$637.46.

At a November 26, 2002 hearing before Judge Frobish, the parties stipulated claimant received monthly Social Security retirement benefit payments of \$973 per month from March 1999 through December 1999.¹ Respondent's attorney stated that those payments commenced March 2, 1999.²

At the same hearing, the parties also agreed claimant's Social Security retirement benefits later increased to \$1,059 per month, or \$244.39 per week. Respondent's attorney stated the increase occurred effective December 2001.³

The parties likewise agreed at the November 2002 hearing that claimant began receiving retirement benefits from the Kansas Public Employees Retirement System (KPERs) effective August 1999. The parties stipulated claimant received \$472.62 per month in retirement benefits from KPERs, which created an offset against claimant's workers compensation benefits of \$39.26 per week after considering claimant's contributions to the retirement plan.

The Workers Compensation Act provides that compensation benefits should be reduced by retirement benefits. The Act reads:

If the employee is receiving retirement benefits under the federal social security act or retirement benefits from any other retirement system, program or plan which is provided by the employer against which the claim is being made, any compensation benefit payments which the employee is eligible to receive under the

¹ M.H. Trans. (Nov. 26, 2002) at 4-5.

² *Id.* at 6.

³ *Id.* at 6.

workers compensation act for such claim shall be reduced by the weekly equivalent amount of the total amount of all such retirement benefits, less any portion of any such retirement benefit, other than retirement benefits under the federal social security act, that is attributable to payments or contributions made by the employee, but in no event shall the workers compensation benefit be less than the workers compensation benefit payable for the employee's percentage of functional impairment.⁴

A permanent total disability pays benefits of \$125,000 at a weekly compensation rate based on the calculation set forth in K.S.A. 44-510c (Furse 1993). A permanent partial disability, on the other hand, would pay the weekly compensation for a certain number of weeks based on the formula set forth in K.S.A. 1998 Supp. 44-510e. As a result, the reduction in compensation for retirement benefits cannot be accomplished in exactly the same way by simply reducing the weekly compensation for the weeks benefits are payable. Stated another way, the reduction in weekly compensation benefits for a permanent partial disability is accomplished by reducing such weekly benefits for the number of applicable disability weeks. But a permanent total disability award differs because there is no limitation on the number of disability weeks, but instead there is a monetary limit.

The Board concludes that the deduction is accomplished by calculating the number of weeks of benefits to be paid for the temporary and permanent total disability and then reducing the weekly compensation for that total number of weeks ($\$125,000 \div \366 weekly compensation rate = 341.53 weeks of benefits).

To calculate the retirement reduction in any other manner would effectively dilute or eliminate the offset.

Accordingly, from the date of accident on June 25, 1999, through July 31, 1999, claimant's disability benefits should be reduced by \$224.54 per week as that is the weekly equivalent of the \$973 per month that claimant received in Social Security retirement benefits during that period.

Commencing August 1, 1999, claimant's disability benefits should be reduced both by \$224.54 per week due to his Social Security retirement benefits and \$39.26 per week due to his KPERS retirement benefits. Consequently, commencing August 1, 1999, claimant's disability benefits should be reduced by a total of \$263.80 per week.

Finally, starting December 1, 2001, claimant's disability benefits should be reduced by \$283.65 per week due to the increase in claimant's Social Security retirement benefits.

⁴ K.S.A. 1998 Supp. 44-501(h).

The Board adopts the findings and conclusions set forth in its July 31, 2003 Order to the extent they are not inconsistent with the above.

AWARD

WHEREFORE, the January 31, 2003 Award entered by Judge Frobish is modified, as follows:

Willie McIntosh is granted compensation from Sedgwick County for a June 25, 1999 accident and resulting disability. Based upon an average weekly wage of \$637.46, Mr. McIntosh is entitled to receive the following disability benefits:

For the period from June 25, 1999, through July 31, 1999, Mr. McIntosh is entitled to receive 5.14 weeks of temporary total disability benefits at \$141.46 (\$366 - \$224.54) per week, or \$727.10.

For the period from August 1, 1999 through August 19, 2000, Mr. McIntosh is entitled to receive 55 weeks of temporary total disability benefits at \$102.20 (\$366 - \$263.80) per week, or \$5,621.

For the period from August 20, 2000, through November 30, 2001, Mr. McIntosh is entitled to receive 66.86 weeks of permanent total disability benefits at \$102.20 (\$366 - \$263.80) per week, or \$6,833.09.

Commencing December 1, 2001, Mr. McIntosh is entitled to receive 214.53 weeks of permanent total disability benefits at \$82.35 (\$366 - \$283.65) per week, or \$17,666.55. The total award equals \$30,847.74 (which is \$125,000 less the appropriate Social Security retirement benefit and KPERS retirement benefit credits).

As of November 24, 2004, Mr. McIntosh is entitled to receive 5.14 weeks of temporary total disability benefits at \$141.46 per week, or \$727.10, plus 55 weeks of temporary total disability benefits at \$102.20 per week, or \$5,621, plus 66.86 weeks of permanent total disability benefits at \$102.20 per week, or \$6,833.09, plus 155.71 weeks of permanent total disability benefits at \$82.35 per week, or \$12,822.72, for a total due and owing of \$26,003.91. Thereafter, the remaining balance of \$4,843.83 shall be paid at \$82.35 per week until paid or until further order of the Director.

Respondent is entitled to receive credit for any and all payments previously made as provided by K.S.A. 1998 Supp. 44-525 and K.S.A. 1998 Supp. 44-556.

The Board adopts the orders set forth in its July 31, 2003 Order that are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of December 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

The undersigned Board Member respectfully dissents from the method the majority employs to calculate this permanent total disability award. I agree with the majority that the retirement offset provisions in K.S.A. 1998 Supp. 44-501(h) are intended to and do reduce the amount of the weekly disability compensation. I disagree, however, that this weekly reduction likewise reduces the total dollar amount of permanent total disability compensation that is payable. Permanent total disability compensation, unlike permanent partial disability compensation, is subject only to a dollar limit, not to any time limit or fixed number of weeks.⁵ “The payment of compensation for permanent total disability shall continue for the duration of such disability”⁶ As such, the weekly compensation in this case should continue, albeit at the reduced weekly rate, until the \$125,000 maximum has been paid.⁷ I would not, as the majority has done, reduce both the amount of the weekly compensation and the \$125,000 maximum by the amount of the retirement offset. Permanent total disability compensation is intended to be wage replacement. The purpose of the retirement offset is to avoid duplication of those benefits.⁸ This purpose is served by reducing the amount of the weekly benefit. It is not served by also reducing the number of weeks those weekly benefits are payable.

⁵ See K.S.A. 44-510c (Furse 1993) and K.S.A. 1998 Supp. 44-510e.

⁶ K.S.A. 44-510c(a)(1) (Furse 1993).

⁷ K.S.A. 44-510f(a)(1) (Furse 1993).

⁸ *McIntosh v. Sedgwick County*, 32 Kan. App. 2d 889, 91 P.3d 545, rev. denied ____ Kan. ____ (2004).

BOARD MEMBER

c: Steven R. Wilson, Attorney for Claimant
Richard J. Liby, Attorney for Respondent
Administrative Law Judge, Wichita
Paula S. Greathouse, Workers Compensation Director